STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW BERG, Plaintiff-Appellant,	UNPUBLISHED June 5, 2007
v JEWISH ACADEMY OF METROPOLITAN DETROIT, Defendant-Appellee.	No. 271204 Oakland Circuit Court LC No. 2005-069144-CD

MATTHEW BERG, Plaintiff-Appellant,	
v JEWISH ACADEMY OF METROPOLITAN DETROIT, Defendant-Appellee.	No. 273398 Oakland Circuit Court LC No. 2005-069144-CD

Before: Meter, P.J., and Kelly and Fort Hood, J.J.

PER CURIAM.

In docket number 271204, plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. In docket number 273398, plaintiff appeals the trial court's order assessing case evaluation sanctions against him. We affirm.

I. Facts

Defendant's curriculum combines college-preparatory classes with Jewish studies. Plaintiff began working for defendant in 2001 as the school's business manager. When defendant hired plaintiff, Rabbi Lee Buckman, the head of the school, knew that plaintiff was not

Jewish. Defendant employed plaintiff pursuant to a series of one-year renewable contracts.[1] Beginning in 2004, plaintiff engaged in unprofessional conduct including shouting and swearing at co-workers and kissing a female co-worker. Plaintiff apologized in writing admitting that he acted unprofessionally and kissed the female co-worker. In 2005, defendant informed plaintiff that it would not renew his employment contract.

In September 2005, plaintiff filed a complaint against defendant alleging that it violated the Elliott-Larsen Civil Rights Act (CRA), MCL 37.2201 *et seq.* by giving plaintiff a punitive work schedule, refusing to renew his employment contract, and filling his position with someone who is Jewish. Plaintiff also asserted that defendant violated the Family and Medical Leave Act (FMLA), 29 USC 2601 *et seq.* when, after he requested FMLA leave, defendant denied his request instead subjecting him to a punitive work schedule and refusing to renew his contract. Plaintiff also alleged violation of the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1201 *et seq*.

Defendant filed a motion for summary disposition asserting that plaintiff admittedly engaged in unprofessional conduct during the 2004-2005 school year. Defendant cited plaintiff's deposition testimony in which plaintiff admitted that his actions were unprofessional. Defendant also asserted that plaintiff's FMLA claim should be dismissed because plaintiff did not miss any work or suffer a serious health condition.

In his response to defendant's motion for summary disposition, plaintiff cited only his own deposition testimony, in which he stated that he told two people that he wanted to enroll his daughter in the school, and one of them stated, "I don't think Rabbi Buckman is going to like it." He also testified that he asked Rabbi Buckman about tuition remission for employees and Rabbi Buckman stated, "Well, I don't think it's going to happen." Plaintiff also testified that, in a discussion with Rabbi Buckman about improving the tuition assistance process, Rabbi Buckman stated, "You know, Matt, when people come to your office they expect you to be Jewish." Plaintiff also asserted that Rabbi Buckman told him, "Matt, we'll never find somebody with your experience and skills, but we will find somebody who fits the greater vision o the Academy." By way of indirect evidence, plaintiff asserted that defendant only placed an advertisement for plaintiff's position in the Jewish News. Regarding his FMLA claim, plaintiff, again citing only his deposition testimony, asserted that he requested one week of FMLA leave in March 2005 "to treat his depression and restart his drug therapy." Plaintiff asserted that defendant denied this request instead putting him on a punitive work schedule.

On June 6, 2006, the trial court entered an order granting defendant's motion for summary disposition. The trial court ruled that plaintiff cited as direct evidence of

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[1] The 2004-2005 contract provided:

> This Contract shall terminate on August 1, 2005. The Board of Directors, in its absolute discretion may offer to renew this Contract by notifying the Business Manager of its intention to do so, in writing, by June 30, 2005. Absent such written notice, the Contract is <u>not</u> renewed. [Emphasis in original.]

discrimination statements made by someone other than Rabbi Buckman and statements made by Rabbi Buckman that were not discriminatory. With regard to indirect evidence, the trial court ruled that defendant failed to establish that defendant's nondiscriminatory reasons for deciding not to renew plaintiff's contract were pretextual. Regarding plaintiff's FMLA claim, the trial court cited *Throneberry v McGehee Desha County Hosp*, 403 F3d 972, 978 (CA 8, 2005), and ruled that because defendant would not have renewed plaintiff's contract "regardless of whether or not Plaintiff had taken leave under FMLA," defendant did not interfere with plaintiff's rights under the FMLA.

Defendant subsequently filed a motion for case evaluation sanctions. Defendant argued that a case evaluation panel awarded plaintiff $3,500, which plaintiff rejected by not filing a written acceptance. Defendant asserted that, pursuant to MCR 2.403(O)(2)(c), defendant was the prevailing party entitled to case evaluation sanctions. In response to this motion, plaintiff made several assertions including that defense counsel "cowed" plaintiff's counsel into making numerous mistakes such as failing to depose key witnesses and failing to challenge false statements made by defense counsel in its case evaluation summary. Plaintiff requested, in light of "the numerous examples of purposeful misstatements" by defense counsel, that the trial court dismiss defendant's request for case evaluation sanctions. The trial court entered an order and opinion granting defendant case evaluation sanctions in the amount of $3,527.45.

II. Analysis

A. Docket No. 271204

1. CRA Claim

Plaintiff first contends that the trial court erred in granting defendant's motion for summary disposition of his religious discrimination claim pursuant to MCR 2.116(C)(10). We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

Proof of discriminatory treatment in violation of the CRA may be established by direct, indirect, or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Direct evidence is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Id.* at 132-133 (punctuation and citations omitted). To prove a case by indirect or circumstantial evidence, the plaintiff must proceed using the burden-shifting approach set forth in *McDonnell Douglass Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973); *Sniecinski, supra* at 133-134. To establish a prima facie case of discrimination, a plaintiff must prove that: (1) he belongs to a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) his failure to obtain the position occurred under circumstances that give rise to an inference of unlawful discrimination. *Id.* at 134. After

establishing a prima facie case, the burden shifts to the defendant to articulate a "legitimate nondiscriminatory reason for the adverse employment action." *Id.* If the defendant does so, "the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination." *Id.*

As direct evidence, plaintiff cites on appeal his own testimony that defendant advertised for plaintiff's position only in the Jewish News. He also cites Rabbi Buckman's statements, "We will not find a candidate with your skills and experience, but we will find someone who fits the greater vision of the academy." and "We have found a suitable candidate to replace you." We agree with the trial court that none of this evidence is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Sniecinski, supra* at 132-133. Therefore, we conclude that plaintiff failed to present direct evidence of religious discrimination.

Plaintiff asserts that the same evidence could also be viewed as indirect evidence of religious discrimination. Even assuming that it is, and that plaintiff established a prima facie case of discrimination, defendant asserted that it did not renew plaintiff's contract because of plaintiff's unprofessional conduct, which is a legitimate nondiscriminatory reason. Thus the burden shifted back to plaintiff and he was required to demonstrate *with evidence* that these reasons were a mere pretext for discrimination. However, plaintiff has failed to cite any evidence or provide any analysis under the burden-shifting approach demonstrating that defendant's reasons for not renewing his contract were pretextual. Defendant, on the other hand, has cited evidence that plaintiff admitted to acting unprofessionally. Therefore, plaintiff failed to create a genuine issue of material fact as to whether defendant's reason for not renewing plaintiff's contract was a mere pretext for discrimination.

The trial court did not err in dismissing plaintiff's religious discrimination claim.

2. FMLA Claim

Plaintiff also contends that the trial court erred in dismissing plaintiff's FMLA claim because its ruling did not address "the question of denial of leave." However, while plaintiff asserts that he requested FMLA leave and that defendant denied his request, he does not support these factual statements with references to the record. A party may not leave it to this Court to search for the factual basis to sustain or reject his position, but must support factual statements with specific references to the record. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Nonetheless, we have reviewed the lower court record and found that, in his response to defendant's motion for summary disposition, plaintiff cited his own deposition testimony in which he stated that he requested one week's FMLA leave at a board meeting. He also testified that defendant denied his request. However, plaintiff provided no written or other evidence of the request and denial. In his deposition, plaintiff stated that Rabbi Buckman wrote an e-mail, in which he set forth a new work schedule for plaintiff. However, plaintiff did not attach that e-mail as an exhibit to his response to defendant's motion for summary disposition. And while it is included in the numerous exhibits plaintiff has provided on appeal, it, along with many of the other exhibits, is not part of the lower court record. Appellate review is limited to the record established in the lower court; a party may not expand the record on appeal. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Nonetheless, having reviewed the e-mail, we note that while Rabbi Buckman did put plaintiff on

a new schedule, there is no mention that it was in response to plaintiff's request for FMLA leave, nor is there any mention of plaintiff's FMLA request anywhere in the e-mail or related e-mails. Therefore, we conclude that plaintiff failed to create any genuine issue of material fact as to whether he requested FMLA leave or as to whether defendant denied his request.

Even if plaintiff did present sufficient evidence to create a genuine issue of material fact as to whether defendant denied his FMLA request, he has also failed to demonstrate a genuine issue of material fact as to whether he was entitled to leave. Pursuant to section 102(a)(1)(D) of the FMLA, an employee is entitled to 12 workweeks of leave during any 12-month period "[b]ecause of a serious health condition that makes the employee *unable* to perform the functions of the position of such employee." (Emphasis added.) Defendant asserts that plaintiff did not miss any days of work and, therefore, demonstrated that he was able to perform his functions. Plaintiff, however, states that the question is not whether he physically showed up at work, but rather, "whether he could perform the duties of his job while suffering from a serious medical condition." But again, plaintiff has not cited any evidence to support his assertion that he could not perform his job duties due to his condition. Moreover, in his response to defendant's motion for summary disposition, plaintiff wrote,

> . . . due to Berg's ability to function at a high level, he is able to cover up the fact that his depression sometimes causes him to be an unproductive worker. In short, despite his depression, he *has always found ways to fulfill the responsibilities at work.* This is the general pattern Berg followed at JAMD. [Emphasis added.]

With this statement, plaintiff admitted that he was *able* to perform his job duties. Further, his deposition testimony demonstrates that, though he experienced periods of unproductiveness, he was able to make up for those times with high levels of efficiency. Therefore, plaintiff has failed to demonstrate a genuine issue of material fact as to whether he was able to perform the functions of his position.

For these reasons, we conclude that the trial court did not err in granting defendant's motion for summary disposition of plaintiff's FMLA claim.

3. PWDCRA Claim

Plaintiff also contends that the trial court acted improperly by accepting a stipulated order to dismiss his PDCRA claim. The trial court entered a stipulated order to dismiss this claim with prejudice. Plaintiff now asserts that his attorney failed to communicate with him and obtain his permission before entering into this agreement. However, "a party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). "Error requiring reversal must be that of the trial court, and not error to which an aggrieved party contributed by plan or negligence." *Muci v State Farm Mut Automobile Ins Co*, 267 Mich App 431, 442-442; 705 NW2d 151 (2005). Accordingly, because plaintiff's attorney agreed to the stipulation, plaintiff cannot now claim that the trial court acted improperly by accepting it. To the extent plaintiff claims his attorney acted improperly, there is no such issue set forth in plaintiff's statement of the issues presented. The failure to include an issue in the statement of questions presented on appeal constitutes an improper presentation of the issue. MCR 7.212(C)(5); *Health Care Ass'n Workers*

Compensation Fund v Director of the Bureau of Worker's Compensation, Dep't of Consumer & Industry Services, 265 Mich App 236, 243; 694 NW2d 761 (2005). Additionally, plaintiff has failed to cite any case law or record evidence in support of his assertions. "A party may not leave it to this court to search for authority to sustain or reject its position." *Sherman*, *supra* at 57 (punctuation and citation omitted). Therefore, we conclude that this issue is without merit.

B. Docket No. 273398

In this consolidated appeal, plaintiff first contends that the trial court abused its discretion in assessing costs that occurred before rejection of the case evaluation award and had no causal nexus to the rejection. Plaintiff does not dispute that defendant was entitled to case evaluation sanctions.

Pursuant to MCR 2.403(O), if a party rejects an evaluation and the case proceeds to judgment "entered as a result of a ruling on a motion after rejection" and that judgment is less favorable than the evaluation, that party must pay the opposing party's actual costs. Pursuant to MCR 2.403(O)(6), actual costs include "those costs taxable in any civil action" and "a reasonable attorney fee . . . for services necessitated by the rejection of case evaluation." Generally, in a civil action, "[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise for reasons stated in writing and filed in the action." MCR 2.625(A)(1).

Defendant correctly points out that, pursuant to these rules, it was permitted to recover for all of its *taxable costs*, regardless of when they were incurred. Included in these costs were the costs of plaintiff's deposition transcript. On the other hand, defendant could only recover for *attorney fees* "for services necessitated by he rejection of case evaluation." MCR 2.403(O)(6). Plaintiff apparently believes, incorrectly, that MCR 2.403(O)(6) applies to taxable costs, such as the cost of the deposition transcript. In fact, plaintiff refers to the deposition transcript as "costs of preparing for" defendant's summary disposition hearing. But the cost of a deposition transcript is a taxable cost, not an attorney fee. The trial court did not err in assessing the cost of the transcript against plaintiff.

Plaintiff also contends that the trial court erred in awarding plaintiff attorney fees incurred on June 8, 2006, which were associated with "Receipt and review of Court opinion granting summary disposition; Preparation of email to clients and insurance company." Plaintiff contends that this fee was not caused by plaintiff's rejection of the case evaluation award, but rather, by the summary disposition hearing, which occurred one week before plaintiff's rejection of the case evaluation award. This is patently incorrect. The attorney received and reviewed the trial court's *opinion* granting defendant's motion for summary disposition. The opinion was not entered until June 6, 2006, after plaintiff's rejection. We also reject plaintiff's argument that his rejection could not have *caused* this fee to be incurred. Under *Haliw v Sterling Heights*, 471 Mich 700, 711; 691 NW2d 753 (2005), the fact that defendant's attorney was required to continue representing defendant in this case in the trial court subsequent to plaintiff's rejection provides sufficient causal nexus. The trial court did not err in assessing this fee against plaintiff.

Plaintiff also contends that costs and fees should not have been awarded to defendant because plaintiff offered to settle the claim for $1,100. But plaintiff has not cited any authority

for the proposition that his offer precludes or limits defendant's recovery of case evaluation sanctions. And our review of the case evaluation court rules has revealed no such exception.

Finally, plaintiff contends that defendant's motion for case evaluation sanctions should be declared frivolous because defendant filed it to interfere with plaintiff's appeal. However, the Michigan Court Rules permit a prevailing party to seek case evaluation sanctions. Plaintiff has conceded that defendant was the prevailing party in this case. Furthermore, we have concluded above that the contested costs and fees were appropriately assessed against plaintiff. As such, we do not view defendant's motion, as plaintiff suggests citing MRPC 3.1, as "primarily for the purpose of harassing or maliciously injuring a person," nor did it lack "a good faith argument on the merits." Rather, the primary purpose of defendant's motion was to recover costs and fees to which defendant was entitled pursuant to the court rules. Additionally, our review of the hearing transcript does not support plaintiff's assertion that defendant "ma[d]e clear" that its motion for case evaluation sanctions was filed merely to interfere with plaintiff's appeal. Defendant simply asserted that it had already begun incurring costs defending plaintiff's appeal and was seeking "a full award for this window period of case evaluation sanctions, since we won't be compensated for our appellate fees." See *Haliw, supra* at 711. This argument does not demonstrate improper conduct on the part of defendant or defense counsel. Therefore, we conclude that this issue is without merit.

Affirmed.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood